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APR 26 1900
JAMES H. McKENNEY,
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No. 512.

Brf. of Hertenstein for Appellee

United States Supreme Court.

No. 512.

Filed April 26, 1900.

W. A. HICKS, Trustee,

Appellant,

v.

MISS BERTHA KNOST,

Appellee

IN BANKRUPTCY.

Brief for Appellee.

FREDERICK HERTENSTEIN,
Counsel for Appellee

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In the Supreme Court of the United States.

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IN BANKRUPTCY.

BRIEF FOR APPELLEE.

The question raised by the certificate in this case is: Whether the district court, as a court of bankruptcy, has jurisdiction to set aside a payment of money to a third party as fraudulent against creditors of the bankrupt, and to order the repayment of the money to the trustee where, the bankrupt, the trustee and such third party are inhabitants of the same district.

The determination of this question will depend upon the construction placed upon the Bankruptcy Act of 1898, providing for jurisdiction, and the following provisions are presented for consideration:

"Section 2. That the courts of bankruptcy, * * * viz.: the district courts of the United States * * * are hereby made courts of bankruptcy and are invested * * * with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings * * * to * * * (7) cause the estates of bankrupts to be collected reduced to money and distributed, and determine controversies in relation thereto, except as herein otherwise provided."

"Section 23. Jurisdiction of the United States and state courts.

"*a.* United States circuit courts shall have jurisdiction of all controversies at law and in equity, as distinguished from proceedings in bankruptcy, between trustees as such and adverse claimants concerning the property acquired or claimed by the trustees, in the same manner and to the same extent only as though bankruptcy proceedings had not been instituted and such controversies had been between the bankrupts and such adverse claimants.

"*b.* Suits by the trustee shall only be brought or prosecuted in the courts where the bankrupt, whose estate is being administered by such trustee, might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant.

"*c.* The United States circuit courts shall have concurrent jurisdiction with the courts of bankruptcy, within their respective territorial limits, of the offenses numerated in this act."

We are, of course, seeking to determine what the legislative body intended when it used the language quoted—not what should have been enacted, but what, in fact, was the intent of the body when fixing the limits of jurisdiction as contained in the act.

Upon this we beg to submit the following suggestions:

First: To discover intent we must primarily examine the language used.

The district courts by section 2, are given such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in bankruptcy proceedings * * * to * * * (7) cause the estates of bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto, except as herein otherwise provided.

Now, what would one ordinarily understand by this language? Jurisdiction to determine controversies with respect to bankrupts' estates is given generally, but subject to this exception: whenever in the act there is a provision by whose terms controversies with reference to the bankrupt's estate must be determined otherwise than by the district courts, then that provision shall determine the jurisdiction, and the provision in section 2, paragraph 7, shall not be operative. This must certainly be the meaning, otherwise there can be no meaning whatever attached to the exception appended to paragraph 7. It surely had some purpose, because it is the only exception that is attached to any of the nineteen specifications of jurisdiction contained in section 2.

If this is the intent and meaning of paragraph 7, then we must look further in the act to find what provision is elsewhere made for "otherwise" determining controversies which may arise in relation to the bankrupt's estate.

In searching the act for other provisions our attention is attracted by the caption to section 28, "Jurisdiction of United States and state courts." While the caption to a section may not be absolutely conclusive of what the subject matter of the section is, yet when we are seeking to determine what the legislative intent is, certainly the expression of that body as contained in a statement of what the body is about to enact is a matter of the highest importance. If a man were to open his statement by saying: "I am about to speak to you with reference to the Coliseum at Rome," and should then discourse for an hour upon the architecture, history and general objects of that building without mentioning the name of Rome, certainly, if a question arose as to whether the man was speaking of the amphitheater at Rome or the one at Pompeii, or the less pretentious one at Verona, the fact that the man stated in the outset that he was about to speak of the one at Rome would be conclusive of the fact that he *intended* to speak of the one at Rome, although what he said might apply in many respects to one or both of the other two.

So here, after this statement of the subject-matter of section 28, we must certainly expect to find in it some provision which will necessarily result in jurisdiction by the United States courts and also some in jurisdiction in the state courts, although one or both of the courts may not be mentioned by name.

Paragraph *a* of this section provides that the circuit courts shall have jurisdiction of all controversies at law and in equity, as distinguished from proceedings in bankruptcy, between trustees as such and adverse claimants concerning the property acquired or claimed by the trustee in the same manner and to the same extent only as though bankruptcy proceedings had not been instituted and such controversies had been between the bankrupt and such adverse claimants. In other words, if a controversy should arise between the trustee and adverse claimants with reference to property acquired or claimed by the trustee, the circuit court shall have jurisdiction of the cause if the bankrupt could have gone into that court in case the controversy had arisen between him and the adverse claimants. Now, when could the bankrupt have gone into that court in case the controversy had been between him and the adverse claimants? Only in case the controversy involved two thousand dollars. If the controversy did not involve two thousand dollars, neither the bankrupt nor the adverse claimants could have gone into the circuit court, and the suit must be brought somewhere else, and the next paragraph determines where.

Paragraph *b* allows the trustee to bring and prosecute suits in those courts only where the bankrupt might have brought or prosecuted them if bankruptcy proceedings had not been commenced, unless the defendant consents that they shall be brought elsewhere.

This paragraph is obviously intended to regulate the place and not the subject of the action—the jurisdiction of the person and not of the subject matter—because consent can give jurisdiction of the person, but not of the subject matter. The trustee, under this paragraph, can prosecute suit in such courts, and in such courts only, as the bankrupt could have proceeded in, had no proceedings in bankruptcy been commenced. Now, it is important to ask, where could a bankrupt have sued such adverse claimants had no proceedings in bankruptcy been begun? This certainly must be the test, if the paragraph has any meaning at all. He certainly could *not* have sued in the district courts, because they have no jurisdiction of controversies between private parties of the nature that we are considering.

He could *not* have sued in the circuit courts if he and the third parties were citizens of the same district as, they are in the case at bar He *could* have sued in the circuit courts if he were a citizen of a different district from the proposed defendant; and he *could* have sued in the state courts even if he and a third party were citizens of the same district. When we ask, then, where the bankrupt could have sued the appellee in the controversy at bar had no proceedings in bankrupty been commenced, and the two parties had appeared simply as two citizens of the same district, there certainly can be but one answer—he would have had to go into the state courts of competent jurisdiction, since there would have been no others to which he could have resorted.

Now, it is no objection to this conclusion that the section does not mention the state courts by name, for the reason that the United States statutes can not confer jurisdiction on state courts. They can, however, provide that a person shall resort to a state court, if he has a cause of action which is recognized by the jurisprudence of the country and desires to enforce it, by declaring that he shall not resort to the United States courts with a cause of action of that nature, or against a defendant who resides in the same district with him and such a provision will determine that the person must resort to the state courts, if he wishes to settle his controversy, quite as effectively as if the state courts had been mentioned by name. The mentioning by name could have added nothing. The fixing of the test as to where the trustee shall proceed, if he desires to proceed at all, is what is effective. When we find where the bankrupt would have had to have brought his action against the proposed defendant we have determined where, and where alone, the trustee can proceed, whether it be in the United States courts or in the courts of the state.

If our analysis of the words of the statute be correct, then the intent of the legislative body was that: The courts of bankruptcy should have jurisdiction of the nineteen subjects mentioned in section 2 and including controversies in relation to the estates of bankrupts, except that when a controversy

arises between a trustee and a third party, stranger to the proceedings, then the trustee must bring his action in the circuit court, if the fact of amount and citizenship permit, and, if they do not, his action must be brought in the state courts having jurisdiction of such controversies. This intent gives adequate meaning to all the words of the statute, and is the only one, as it appears to us, that does.

As to what controversies with reference to the bankrupts' estates the bankrupt courts would have cognizance of under paragraph 7 of section 2, it would probably be useless now to inquire; certainly such as arise between the trustee as such and the bankrupt himself, and the trustee and the creditors of the bankrupt would be within this jurisdiction; and probably many others may arise in time out of the power to appoint receivers and other extraordinary powers granted the bankruptcy court under the nineteen specifications, but it is sufficient for the determination of this action that, when a controversy arises between the trustee and a stranger to the proceedings, the trustee can only bring suit against such stranger in the state courts, unless by reason of diverse citizenship and limit of amount, he may resort to the circuit courts.

It has been further suggested that section 26, providing for arbitration of controversies, and section 27, as to compromises, are also exceptions to the jurisdiction of the bankruptcy courts to determine controversies in relation to bankrupts' estates, as provided by the clause appended to paragraph 7 of section 2.

This is probably so, and does not detract in any degree from the force of the suggestion that the provision of section 23 is another. It occurs, however, that there may be some question as to whether the power to direct an arbitration, as provided in section 26, or the power to approve a compromise, as provided in section 27, is the exercise of jurisdiction to determine causes in the sense that we ordinarily speak of the jurisdiction of courts.

We submit that the words of the act do not support the contention of the appellant, but do disclose an intent on the part of the legislative body that the parties shall resort to the state courts in controversies where the facts are as in the case at bar.

Second: While the words used must, in the first instance, be looked to to determine intent, yet other circumstances may be of weight in connection with the words used. In connection with the wording of the act we desire to direct the attention of the court to the fact that the contention of the appellant is in direct conflict with the long-established policy of the United States with reference to the jurisdiction of its courts, while the contention insisted upon by the appellee is in strict accordance with this policy.

If the construction claimed by the appellant be correct, then the trustee may summon parties into the district courts in controversies which may arise between him and strangers

to the bankruptcy proceedings from all quarters of the district for a matter of $10, as well as a matter of $10,000, and that, without reference to the fact that the trustee and such parties may all be residents of the same district. All barriers as to amount, as well as location, are thrown down. The long-established law that petty controversies, formerly under $500, now under $2,000, should be litigated in the state courts at the place where the litigants live and where they can be carried on with the least possible expense and inconvenience, would by such construction be at once abrogated and a smaller limit placed upon the jurisdiction of such courts than now exists upon that of a country justice of the peace in the state of Ohio. The policy of Congress in this regard has been to further restrict rather than to extend the field of possible litigation permitted in the United States courts, as instanced by raising the limit from $500 to $2,000, and other instances that might be mentioned. Surely, if it was the intention of this act, once for all, to reverse this policy, it should be shown by most unmistakable language. The court will find this point stated with great terseness and force by Judge Thompson when passing upon the motion of this case below. See 94 Fed. Rep. 625.

Third: But, not only does the policy of Congress with reference to the courts of the United States sustain the contention of the appellee, as well as the language of the act, but the nature of the provision of section 23, when viewed in the light of the previous Bankruptcy Act of 1867, have the same effect. When trying to reach the intention of Congress, we must remember that it had the act of 1867, with all the decisions with reference to it, before it, and that it must be assumed that Congress attempted to avoid any possible doubts that may have arisen as to the application of that act. It will, in this connection, be observed that paragraph *b* of section 23 is entirely new. There was no such provision in the act of 1867. What object was to be accomplished by it? Section 4979 of the Revised Statutes of the United States (part of the act of 1867), which confers jurisdiction on the circuit courts, is strikingly similar to the language of section 23, paragraph a, except that the jurisdiction therein conferred shall be concurrent with that of the district courts. There was much controversy as to jurisdiction under the old act, and the act was repealed before much of it was determined by the supreme court. It would seem that the object which must have been intended by paragraph b of section 23, when viewed in connection with the former act, was to put the question of where the trustee should litigate his controversies beyond the question of a doubt: he can only go into those courts where the bankrupt could have gone, in case the controversy had been between him and the adverse party. This was to be the simple test to be applied in every case. If the jurisdictional requirements for a suit in the federal court were present, he

could go into the circuit court, as provided in paragraph *a*; if not, then he must resort to the state courts, as mentioned in the caption to the section.

We can not do better with reference to the circumstances which led up to the enactment of these provisions in the act of 1898, with reference to jurisdiction, than to refer the court to the very extended historical preface to the opinion of the judge of the circuit court of appeals, in deciding the case of In the Matter of D. Abraham, 98 Fed. Rep. 767.

In the further consideration of the intent of Congress in the enactment of this law, it is a matter of some consequence at least to find that the gentlemen who had this bill in hand, both in the senate and in the house, thought that the bill had the effect to limit the jurisdiction of district courts, as contended by the appellee, and that the bill was considered as having this effect in the committees which considered it. See remarks of the judge in deciding the case of Carter v. Hobbs, 92 Fed. Rep. 594.

Fourth: The decided weight of authority, so far as the question has been in issue, is in favor of the appellee's position.

The case of Carter v. Hobbs, 92 Fed. Rep. 594, must be considered as a decision in favor of the appellant herein, and is based upon two considerations: 1. That if it were held that the trustee must go into the state courts in all cases where the federal requirements as to jurisdiction were not present, then the bankruptcy courts would be shorn of their principal function; and, 2. The bankrupt could not by any possibility succeed in such a suit as the statute contemplates he must have been able to bring in order to authorize the trustee to proceed.

As to the first ground. The bankruptcy courts would not be shorn of any power by the construction for which we insist, which it is at all necessary that they should exercise, or which is at all extraordinary that they should not exercise. Jurisdiction of insolvents' estates has ordinarily been confided to probate courts and other courts of limited jurisdiction in the states, and while they have distributed the assets of the insolvents among their creditors, it has always been the law that when suits of a plenary character have arisen between the assignee and a third person, the assignee has been required to go into a court of general jurisdiction to settle the question and bring the fund, if any, into the court of insolvency for distribution. The analogies in our jurisprudence have certainly been opposed to the position taken by the court.

As to the second ground. The fact that in a suit to set aside a fraudulent conveyance, for instance, the bankrupt would fail by reason of an estoppel to question his own act, would not affect the question of jurisdiction. The bankrupt could bring such a suit, the court having jurisdiction of the subject-matter, although he might fail in his proof, the ques-

tion of jurisdiction being an entirely different matter from the question of success in maintaining the suit upon the evidence of fraud.

The case *In re* Sievers, 91 Fed. Rep. 366, and Davis v. Bohle, 92 Fed. Rep. 325, cited by the appellant, are one and the same case, the first citation being a decision of the case in the district court, the second in the circuit court of appeals. The question in *In re* Sievers was not as to jurisdiction to entertain the suit of a trustee at all. No trustee had been appointed in the case. The question, and the only question in the case, was as to whether proceedings in bankruptcy superseded an assignment under state laws. The court held that they did, and the court of appeals affirmed the judgment. It is true that the district judge went into a discussion of the question of jurisdiction, but it was not involved in the case, and when the case was affirmed in the court of appeals not one word was said as to jurisdiction, and no question was, in fact, decided in the case in either court except the one, that bankruptcy proceedings did supersede assignment proceedings for the benefit of creditors under state law.

These cases, together with the case of *Shultze v. The First Nat. Bank*, 98 Fed. Rep., 705, represent the support of the appellant in his position.

The following decisions of district courts have upheld the contention of the appellee:

Burnett v. Morris Mer. Co, 91 Fed. Rep. 365.
Mitchell v. McClure, 91 Fed. Rep. 621.
Hicks v. Knost, 94 Fed Rep. 625.

And the following decision of the circuit court of appeals, for the fifth circuit, was to the same effect:

In re Abraham, 93 Fed. Rep., 767.

On the whole case, we submit that the question as certified should be decided in the negative.

Respectfully submitted,

FREDERICK HERTENSTEIN,

Counsel for Appellee.